

In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

UNITED STATES OF AMERICA, APPELLANT

v.

12 200-Ft. REELS OF SUPER 8 mm. FILM, ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

JURISDICTIONAL STATEMENT

ORDER BELOW

The order of the district court (Appendix A, *infra*)
is not yet reported.

JURISDICTION AND STATEMENT

The present action involves films, magazines and other materials sought to be imported into the United States at Los Angeles by Mr. Ariel G. Paladini. The materials were seized upon customs inspection under the authority of 19 U.S.C. 1305(a), and a forfeiture

proceeding was then commenced upon the ground that the materials are "obscene" within the meaning of that section. On April 27, 1970, the single district judge dismissed the government's action, and ordered return of the seized materials (Appendix A, *infra*), on the basis that Section 1305(a) had been declared unconstitutional on its face by a three-judge district court sitting in the same district. *United States v. Thirty-Seven (37) Photographs*, Jurisdictional Statement filed, No. 133, this Term. On that same date, Mr. Paladini filed an affidavit to the effect that "none of the [materials] were imported by me for any commercial purpose but were intended to be used and possessed by me personally"; the government responded that it had no evidence to contradict this averment.

A notice of appeal to this Court was filed in the district court on May 18, 1970 (Appendix B, *infra*).¹ Under 28 U.S.C. 1252, this Court has jurisdiction on direct appeal to review an order of a United States District Court "holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States * * * is a party." See, *e. g.*, *United States v. Raines*, 362 U.S. 17; *United States v. Sanchez*, 340 U.S. 42.

¹ Application for stays having been denied by the court below, the government sought a stay from this Court. On May 20, 1970, Mr. Justice Brennan granted the government's application pending the timely perfecting of an appeal in this Court, with the proviso that should the appeal be timely filed the stay is to remain in effect "pending the sending down of the judgment of this Court."

The order of the district court herein, relying on the three-judge court decision in *Thirty-Seven (37) Photographs, supra*, is a holding that Section 1305 (a) is unconstitutional, *Clark v. Gabriel*, 393 U.S. 256; the United States is a party; and the *in rem* proceeding for customs forfeiture is in the nature of a civil action. See Brief for the United States in *United States v. United States Coin and Currency*, set for reargument, No. 5, this Term, pp. 11-17.

QUESTION PRESENTED

Whether the United States may validly prohibit the importation of obscene matter which the importer claims is intended for personal use and possession.

STATUTE INVOLVED

19 U.S.C. 1305(a) provides in pertinent part:

All persons are prohibited from importing into the United States from any foreign country * * * any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral * * *. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in

which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: * * * *Provided, further,* That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

THE QUESTION IS SUBSTANTIAL

This case presents a useful companion to the government's pending appeal in *United States v. Thirty-Seven (37) Photographs*, No. 133, this Term—the decision relied upon by the court below. In that case a three-judge district court held the customs obscenity statute, 19 U.S.C. 1305(a), unconstitutional on its face under *Freedman v. Maryland*, 380 U.S. 51, and *Stanley v. Georgia*, 394 U.S. 557, after the importer-claimant had stipulated that the materials were intended for commercial distribution. Here, the importer has averred that the materials are intended for purely personal use and possession. If the Court notes probable jurisdiction in *Thirty-Seven (37) Photographs*, it should also consider this case, which presents another facet of the same problem.

The views of the United States as to the meaning of *Stanley v. Georgia*, *supra*, are set forth in our Jurisdictional Statement in *Thirty-Seven (37) Photographs* and our Brief as *Amicus Curiae* in *Byrne v. Karalexis*, set for reargument, No. 83, this Term. We do not repeat that analysis here. In essence it is our position that *Stanley* held only that the government lacks power to punish or bar the possession of obscene material “in the privacy of a person's own home,” 394 U.S. at 564, and did not purport to decide (as the court in *Thirty-Seven (37) Photographs* construed it to hold) that private individuals have a right to receive matter which is obscene under the standards established in *Roth v. United States*, 354 U.S. 476 and subsequent cases, or to bring it past

the customs station.² As we elaborated in our Jurisdictional Statement in *Thirty-Seven (37) Photographs, supra*, pp. 8-9, 19 U.S.C. 1305(a) is constitutional, in our view, whether an importation of obscene material is intended for commercial or for wholly private purposes. In light of the admittedly commercial purpose of the importation in *Thirty-Seven (37) Photographs*, however, it is apparent that reversal in that case would leave open the question presented by the case at bar, i.e., whether the government's constitutional power to regulate foreign commerce (Article 1, Section 8) gives it authority to bar the importation of obscene material stated to be intended for private use. We submit that it does, and that *Stanley v. Georgia* does not hold to the contrary. This is plainly a question of substantial significance warranting plenary consideration by this Court.

² We would submit that, at least some of the materials in this case (including four booklets submitted to Mr. Justice Brennan in connection with the government's previous application for a stay), are obscene under any standard heretofore expressed in this Court's opinions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should note probable jurisdiction.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

JEROME M. FEIT,
ROGER A. PAULEY,
Attorneys.

JULY 1970.

APPENDIX A

[Filed Apr. 27, 1970 Entered Apr. 27, 1970]

Wm. MATTHEW BYRNE, JR.

United States Attorney

FREDERICK M. BROSIO, JR.

Assistant U. S. Attorney

Crief of Civil Division

LARRY L. DIER

Assistant U. S. Attorney

1100 U. S. Court House

312 North Spring Street

Los Angeles, California 90012

Telephone: 688-2461

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 70-765 IH

UNITED STATES OF AMERICA, PLAINTIFF

v.

12 200-Ft. Reels of Super 8 mm FILM, 1 200-Ft. reel of 8 mm FILM, 7 MAGAZINES entitled "Simona", 2 1970 CALENDARS, 18 COLOR SLIDES, 9 black and white PHOTOGRAPHS, 1 BOOKLET "Rendez-Vous", 17 BROCHURES for "Climax" films, 5 BROCHURES for "Spot Light Film", 19 BROCHURES for the magazines "Prince" and "Dream", 17 BROCHURES for the film "Sixus", 5 miscellaneous BROCHURES, 1 BOOKLET entitled "Dog-Instruction 4", 1 BOOKLET entitled "Animal Orgy", 1 BOOK entitled "Animal Special", 1 ROLL 8 mm film marked "Undeveloped." "Do not open.", DEFENDANTS

ORDER OF DISMISSAL

It appearing that the complaint in this matter is based on 19 U.S.C. § 1305; it further appearing that a three-judge court in *United States of America v. 37 Photographs*, Civil No. 69-2242-F, determined that 19 U.S.C. § 1305 is unconstitutional on its face; and it further appearing that this Court ought to abide by that decision pending its possible review in the United States Supreme Court.

IT IS, THEREFORE, ORDERED that the within action is dismissed and that the United States Marshal return the defendant material to the importer.

DATED: This 27 day of April, 1970.

WARREN J. FERGUSON
United States District Judge

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OPINION BELOW

The order of the district court (A. 3) denying

REASONING

On April 27, 1970, the district court entered a

The court ruled on the motion to *United States v. Thirty-Seven (37) Photographs*, 309 F. Supp. 36 (D.D.C. 1970), reversed, 402 U.S. 363.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-2

UNITED STATES OF AMERICA, APPELLANT

v.

12 200-FT. REELS OF SUPER 8 MM. FILM, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order of the district court (A. 5) dismissing the forfeiture complaint is not reported.

JURISDICTION

On April 27, 1970, the district court dismissed a complaint for forfeiture based on 19 U.S.C. 1305(a), relying on a decision of a three-judge court that the statute was unconstitutional on its face (A. 5).¹ A notice of appeal to this Court was filed in the district court on May 18, 1970 (A. 15). Probable jurisdiction

¹ The court relied on the decision in *United States v. Thirty-Seven (7) Photographs*, 309 F. Supp. 36 (C.D. Calif.), reversed, 402 U.S. 363.

was noted on June 21, 1971. (A. 17). The jurisdiction of this Court rests on 28 U.S.C. 1252. See, *e.g.*, *United States v. Raines*, 362 U.S. 17; *Clark v. Gabriel*, 398 U.S. 256.

QUESTION PRESENTED

Whether the United States may validly prohibit the importation of obscene matter which the importer claims is intended for personal use and possession.

STATUTE INVOLVED

Section 305(a) the Tariff Act of June 17, 1930, 46 Stat. 688, as amended (19 U.S.C. 1305(a)), provides in pertinent part:

All persons are prohibited from importing into the United States from any foreign country *** any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral ***. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: *** Pro-

vided, further, That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

STATEMENT

On April 2, 1970, claimant (Ariel Paladini) sought to import into the United States movie film, color slides, photographs, copies of a magazine, brochures for films, booklets, a book and calendars. These materials were seized by customs authorities at Los Angeles and the matter was referred to the United States Attorney for forfeiture action. An April 9, 1970, a complaint was filed under 19 U.S.C. 1305(a) in the United States District Court for the Central District of California for forfeiture of these items as obscene (A. 2-3). On April 27, 1970, the district judge relying on the decision by a three-judge court in *United States v. Thirty-Seven (37) Photographs*, 309 F. Supp. 36 (C.D. Calif.), dismissed the complaint (A. 5).² Thereafter, the United States filed a motion to stay the dismissal order (A. 6-7), and Mr. Paladini filed an affidavit stating that "none of the * * * [materials] were imported by me for any commercial purpose but were intended to be used and possessed by me personally" (A. 9). In its motion, the government replied that it had no evidence with which to contradict this statement (A. 7).³ The request for a stay was denied by the district court (A. 12-13). The government then sought a stay from this Court. On May 20, 1970, Mr. Justice Brennan granted the government's application with the proviso

² The timing of the steps in this case complies with the limits set in *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363.

³ One reel of a motion picture film and a roll of undeveloped film was returned to Mr. Paladini (see A. 12).

that should the appeal be timely filed the stay would remain in effect pending the judgment of this Court (A. 14).

SUMMARY OF ARGUMENT

Since obscenity is not constitutionally protected speech, and as numerous decisions assume, no one has a constitutional right to purchase obscene materials in this country or purchase them by mail from abroad, it follows that no one has a constitutional right to import obscene materials for personal use after having purchased them abroad. The broad powers of Congress over foreign commerce permit it to exclude materials not protected by the First Amendment. *Stanley v. Georgia*, 394 U.S. 557, does not lead to a different conclusion, for that case rests on the importance of privacy in the home, a consideration not involved in a prohibition on importation.

United States v. Reidel, 402 U.S. 351, and *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, reaffirm the well-established rule that there is no constitutional right to purchase obscene materials. In *Thirty-Seven (37) Photographs* this Court upheld the statutory prohibition on importation of obscene materials in its application to materials imported for commercial use and the plurality opinion reached the same conclusion with respect to materials imported for private use. In light of Congressional and state power to prohibit commercial mailings, importation, and sales of obscene materials, it would be odd to hold that one has a constitutionally protected right to bring into this country obscene materials purchased abroad.